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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: SOCIAL MEDIA ADOLESCENT
ADDICTION/PERSONAL INJURY PRODUCTS
LIABILITY LITIGATION

This Document Relates To:

ALL ACTIONS

MDL No. 3047

Case No. 4:22-md-03047-YGR (PHK)

AGENDA AND JOINT STATEMENT FOR JULY 12, 2024, CASE MANAGEMENT CONFERENCE

Judge: Hon. Yvonne Gonzalez Rogers

Magistrate Judge: Hon. Peter H. Kang

Pursuant to Case Management Order (“CMO”) No. 1 (ECF 75), the Parties submit this agenda and joint statement in advance of the July 12, 2024 Case Management Conference (“CMC”).

I. Update on Pending Motions

A. Motion to Dismiss Personal Injury Plaintiffs' Claims Against Mark Zuckerberg

On April 15, 2024, the Court issued an order granting Defendant Mark Zuckerberg's motion to dismiss 25 Personal Injury ("PI") Plaintiffs' claims against him in his individual capacity, with leave to amend (ECF 518). *See* ECF 753. On April 26, 2024, pursuant to Case Management Order No. 13, ECF 780 ("CMO 13"), these 25 PI Plaintiffs filed a consolidated addendum to their complaints. *See* ECF 794; ECF 832-1 (unredacted version). Defendant filed his motion to dismiss on May 10, 2024 (ECF 833), the PI Plaintiffs filed their opposition on May 23, 2024 (ECF 889), and Defendant filed his reply on May 30,

1 2024 (ECF 916). The Court set oral argument on this motion for the July 12, 2024 CMC. ECF 976, CMO
 2 No. 15 at 2.

3 **B. Motion to Dismiss Negligence *Per Se* Claim of PI Plaintiffs**

4 On June 28, 2024, the Parties met and conferred regarding their proposals for a supplemental
 5 briefing schedule on Defendants' motion to dismiss the PI Plaintiffs' negligence per se claims. Plaintiffs
 6 proposed to continue the Parties' discussions until after the Court rules on the pending motion to dismiss
 7 the State Attorneys General complaint (ECF No. 517), including to discuss whether briefing on negligence
 8 per se should be directed to the bellwether plaintiffs' claims. Defendants are amenable to that approach,
 9 subject to the PI Plaintiffs' agreement that this issue may be briefed in a supplemental motion to dismiss.

10 **C. Motion to Dismiss Certain Non-Priority Claims of PI Plaintiffs**

11 On December 22, 2023, Defendants moved to dismiss the PI Plaintiffs' remaining "non-priority
 12 claims" (Counts 5, 12, 14, 16–18) asserted in the PI Plaintiffs' Second Amended Master Complaint. *See*
 13 ECF 516. The PI Plaintiffs filed their opposition on February 5, 2024. *See* ECF 597. Defendants filed
 14 their reply on February 26, 2024. *See* ECF 644. Defendants and the PI Plaintiffs argued this motion at
 15 the June 21, 2024 hearing and the Court has taken the motion under submission. *See* ECF 976, CMO No.
 16 15 at 1.

17 **D. Motion to Dismiss AG Complaints, Consumer Protection Claims, and Misrepresentation
 18 Claims**

19 On April 19, 2024, the Court heard argument on Meta's motion to dismiss the Multistate Attorneys
 20 General ("AGs") Complaint, the Florida AG's Complaint, and the PI Plaintiffs' Consumer Protection and
 21 Misrepresentation Claims (Counts 7–9). *See* ECF 517.¹ On May 14, 2024, Meta filed supplemental
 22 authority in support of its motion to dismiss (ECF 844), and the AGs responded on May 20, 2024 (ECF
 23

24
 25
 26 ¹ Defendants YouTube, Snap, and TikTok joined Meta's motion to dismiss Count 7 of the PI Plaintiffs'
 27 Amended Master Complaint. *See* ECF 519. The AGs and PI Plaintiffs opposed the motions. *See* ECF
 599; 600.

1 876). On June 19, 2024, the AGs filed an unopposed administrative motion for leave to file additional
 2 supplemental authority (ECF 952), which the Court granted on the record at the June 21, 2024 CMC.

3 **E. Motion to Dismiss Florida AG Complaint**

4 Florida filed an Amended Complaint on April 29, 2024 (*see* Case 4:23-cv-05885-YGR, ECF 23)
 5 and a *Lexecon* objection on April 25, 2024 (*see* Case 4:23-cv-05885-YGR, ECF 22). Florida and Meta
 6 have stipulated to the following briefing schedule for Meta's motion to dismiss Florida's Amended
 7 Complaint: Motion to Dismiss due June 18, 2024; Opposition due July 10, 2024; and Reply due July 17,
 8 2024 (*see* Case 4:23-cv-05885-YGR, ECF 29). The Court granted the stipulation on the record at the June
 9 21, 2024 CMC. On June 18, 2024, Meta filed its motion (Case 4:23-cv-05885-YGR, ECF 30). The Court
 10 has indicated it is open to hearing argument on the motion on a date after the August 9, 2024 CMC, and
 11 will discuss scheduling argument at the July 12 CMC.

12 **F. Motion to Dismiss Claims Asserted in Certain PI Plaintiffs' SFCs Against Snap**

13 On January 12, 2024, Defendant Snap moved to dismiss claims under 18 U.S.C. §§ 2252 and
 14 2252A (also known as the “Identified Counts”) asserted in certain PI Plaintiffs’ amended Short-Form
 15 Complaints pursuant to CMO No. 7 (ECF 479). *See* ECF 533. Those PI Plaintiffs filed their opposition
 16 on February 5, 2024. ECF 598. Defendant Snap filed its reply on February 15, 2024. ECF 613. The PI
 17 Plaintiffs and Snap argued this motion at the June 21, 2024 hearing and the Court has taken the motion
 18 under submission. *See* ECF 728, CMO No. 12 at 6 (setting hearing).

19 **G. Motion to Dismiss School District and Local Government Entity Plaintiffs’ Master
 20 Complaint**

21 On February 5, 2024, Defendants moved to dismiss the claims asserted in the School District and
 22 Local Government Entity (“SD/GE”) Plaintiffs’ Master Complaint (ECF 504). *See* ECF 601. The
 23 SD/GE Plaintiffs filed their opposition on March 4, 2024. *See* ECF 668. Defendants filed their reply on
 24 March 25, 2024. *See* ECF 723. Defendants and SD/GE Plaintiffs argued this motion during the May
 25 17, 2024 CMC and the Court has taken the motion under submission. *See* ECF 883, CMO No. 14
 26 (noting separate order will issue and stipulation with respect to Utah and Arizona law).

H. Motions to Amend to Add Additional Defendants

Plaintiffs represented by the Beasley Allen law firm served notice of their intent to amend to add YouTube and Google as defendants in 14 personal injury cases on June 4, 2024. YouTube and Google have opposed amendment in 7 of those cases (including 3 bellwether personal injury cases): *Clevenger* (22-cv-6457), *Craig* (22-cv-5890), *Melton* (22-cv-6627), *Copelton* (22-cv-6165), *Murden* (22-cv-5889), *Naber* (22-cv-6832), and *Smith* (22-cv-6138). Pursuant to CMO 13A (ECF 877), the consolidated motion packages² were filed by Plaintiffs on June 28, 2024 in each of the individual cases. The motions are fully briefed, and the Court has directed that the motions “should be set for hearing at the next case management conference on the schedule but will likely be addressed on the papers.” ECF 877, CMO 13A at ¶ 5(d).

II. Request for Judicial Intercircuit Assignments

In Case Management Order No. 15 (ECF 976), the Court indicated that it would seek temporary intercircuit assignments in the Eastern District of Pennsylvania, Western District of Kentucky, Northern District of Georgia, and District of Maryland to enable the Court to preside over the trials of bellwether cases that Defendants had selected in those jurisdictions where Plaintiffs asserted a *Lexecon* objection. The Parties understand that the Court intends to have this issue resolved within the next month or so, after speaking with Chief Judge Sutton.

III. Status of Plaintiff Fact Sheets and Protocol for Withdrawal of Counsel

PI Plaintiffs have informed the Court and Defendants that counsel for at least twenty personal injury plaintiffs have been unable to make contact with their clients. These instances of plaintiffs' failure or refusal to communicate with their attorneys have caused at least some of these plaintiffs to miss the Court's Plaintiff Fact Sheet (PFS) submission deadlines. In some but not all of these cases, counsel for the unresponsive plaintiffs have indicated that they intend to move to withdraw.

A prolonged breakdown of communication between a personal injury plaintiff and his or her client not only renders the attorney-client relationship untenable but impairs the Court's efficient administration

² Pursuant to CMO 13A, each motion package includes Plaintiff's motion to amend, YouTube Defendants' opposition, and Plaintiff's reply brief. ECF No. 877, at ¶ 5(a)-(c).

1 of this complex MDL. The PI Plaintiffs and Defendants agree that where a plaintiff is unresponsive to
 2 counsel, counsel should be permitted to withdraw and the plaintiff's claims should be dismissed for failure
 3 to prosecute if the plaintiff, having received adequate notice, does not re-engage and advise the Court of
 4 a desire to proceed. The PI Plaintiffs and Defendants propose below a protocol for handling attorney
 5 withdrawal and dismissal under Rule 41(b) in these circumstances.

6 **A. Legal Background**

7 Under Civil Local Rule 11-5, counsel may withdraw from representation only with the Court's
 8 permission. The Court has discretion to determine whether a request to withdraw is made with good cause.
 9 In exercising this discretion, it applies California Rule of Professional Conduct 1.16(b), which lists factors
 10 warranting permissive withdrawal of counsel. Under the Rule, withdrawal is permissible where the
 11 client's conduct "renders it unreasonably difficult for the lawyer to carry out the representation
 12 effectively." Cal. Rule of Prof'l Conduct 1.16(b)(4).

13 It is unreasonably difficult for a personal injury plaintiff's counsel to carry out the representation
 14 in this MDL, including compliance with Court-imposed deadlines, if the plaintiff fails or refuses to
 15 communicate with counsel. *See Tikotzky v. Remax Real Pros*, 2020 WL 13281523, at *1 (C.D. Cal. Oct.
 16 13, 2020); *Connally v. Cafe*, 2016 WL 1697937, at *2 (N.D. Cal. Apr. 28, 2016); *Ortiz v. Freitas*, 2015
 17 WL 3826151, at *2 (N.D. Cal. June 18, 2015) ("Mr. Ortiz's failure to maintain regular contact with his
 18 counsel and cooperate in moving the litigation forward constitutes good cause for withdrawal."). Where
 19 both the Court and counsel have provided explicit written notice, permitting withdrawal does not cause
 20 harm to the administration of justice and will advance, rather than delay, the ultimate resolution of the
 21 plaintiff's case. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2019
 22 WL 13268604, at *1 (N.D. Cal. Aug. 30, 2019). This may be so even if the client does not consent to the
 23 withdrawal. *Robinson v. Delgado*, 2010 WL 3259384, at *2 (N.D. Cal. Aug. 18, 2010) (noting that the
 24 "consent of the client is not dispositive").

25 Separately, Federal Rule of Civil Procedure 41(b) provides for the involuntary dismissal of an
 26 action when "the plaintiff fails to prosecute or to comply with these rules or a court order." Fed. R. Civ.
 27 P. 41(b). "District courts have the inherent power to control their dockets and, '[i]n the exercise of that

power they may impose sanctions including, where appropriate, . . . dismissal of a case.”” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (citation omitted). The need for vigilance in maintaining control over the Court’s docket and promoting efficient conduct of the litigation is more acute, and the Court’s discretion is accordingly greater, in the context of multidistrict litigation. *In re Phenylpropanolamine (PPA) Prods. Liability Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007) (noting that “MDL courts must be given greater discretion to organize, coordinate and adjudicate its proceedings, including the dismissal of cases for failure to comply with its orders”). The Court has the power to dismiss an action *sua sponte* for failure to prosecute. *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984).

When determining whether to dismiss an action for failure to prosecute, courts weigh five factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *In re PPA*, 460 F.3d at 1226 (citation omitted). Taking these factors into consideration, several courts in the Ninth Circuit have ruled that a plaintiff who fails or refuses to communicate with their attorneys—and thereby misses Court-imposed deadlines—should at least be required to show cause why their case should not be dismissed. *See Williams v. County of Fresno*, 2022 WL 209327 (E.D. Cal. Mar. 3, 2022) (recommending dismissal);³ *McConnell v. United States*, 2021 WL 4818946 (N.D. Cal. Oct. 15, 2021) (ordering the plaintiff to show cause).

19 B. Proposed Protocol

20 In light of the legal framework discussed above, the PI Plaintiffs and Defendants request that the
21 Court establish the following protocol via case management order:

22 1. If counsel for any personal injury plaintiff has lost the ability to communicate effectively with that
23 plaintiff, counsel should move the Court for permission to withdraw pursuant to Civil Local Rule
24 11-5. In so moving, Plaintiff’s counsel must document that his or her client has repeatedly failed

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27 ³ *Findings and recommendations adopted*, 2022 WL 624567 (E.D. Cal. Mar. 3, 2022).

1 to respond to counsel's communications in a manner consistent with counsel's confidentiality
2 obligations.

3 2. The Court will then enter a show-cause order directing the plaintiff to advise the court in writing
4 within **thirty-five (35) days** whether he or she intends to proceed with the case, either through
5 current counsel, with substitute counsel, or without counsel. The order will advise the plaintiff
6 that if the plaintiff responds to the Court that he or she no longer desires to proceed with the case,
7 or if the plaintiff fails to respond within the time provided, the plaintiff's claims will be dismissed
8 for failure to prosecute under Fed. R. Civ. P. 41(b).

9 3. Simultaneous with any motion to withdraw, the plaintiff's counsel must send to the plaintiff, by
10 any means available, written notice that counsel has sought the Court's permission to withdraw
11 because of the failure to communicate.

12 4. Plaintiff's counsel shall mail the Court's show-cause order to the plaintiff at the plaintiff's home
13 address. The plaintiff's counsel shall be required to make diligent continued efforts to contact the
14 plaintiff during the 35-day notice period. The plaintiff's counsel shall promptly inform the Court
15 if it succeeds in re-establishing communication with the plaintiff during the 35-day notice period.

16 5. If the plaintiff timely responds to the show-cause order, the Court shall exercise its discretion in
17 determining whether to permit counsel's withdrawal.

18 6. If the plaintiff timely responds to the show-cause order and states that he or she no longer wishes
19 to proceed with the case, or if the plaintiff fails to respond to the show-cause order, the Court shall
20 enter an order permitting counsel's withdrawal, and shall separately enter an order dismissing the
21 plaintiff's claims.

22 7. A dismissal under paragraph 6 shall be without prejudice, except that if Defendants believe a
23 dismissal with prejudice is warranted under Fed. R. Civ. P. 41(b), Defendants may file a brief in
24 support of its position no later than fourteen (14) days following the expiration of the plaintiff's
25 35-day notice period. The plaintiff shall file a response, if any, within fourteen (14) days of the
26 Defendants' brief, and Defendants shall file a reply, if any, within seven (7) days of the plaintiff's
27

1 reply. The Court will thereafter enter an order dismissing the case, either with prejudice or without
 2 prejudice.

3 The PI Plaintiffs and Defendants believe this protocol strikes the appropriate balance between the
 4 need to provide ample notice to the plaintiff and to protect the plaintiff and other parties from prejudice,
 5 on one hand, and the Court’s need to ensure compliance with case management deadlines and the efficient
 6 administration of the MDL, on the other.

7 **IV. Application of *Jarkesy***

8 In Case Management Order No. 12 (Dkt. No. 728), the Court held in abeyance the issue of the
 9 Seventh Amendment’s applicability to the State Attorneys General consumer protection claims, pending
 10 the Supreme Court’s decision in *Jarkesy v. SEC*. The Supreme Court issued its decision in *Jarkesy* on
 11 June 27, 2024. The parties will consult further on the implications of the *Jarkesy* decision.

12 **V. Discovery Management Conference Statement**

13 A copy of the Parties’ Discovery Management Conference Statement for the July 11, 2024
 14 DMC, due this same date, will be sent electronically to Judge Gonzalez Rogers after it is filed.

15 **VI. JCCP Status Update**

16 On June 7, 2024, Judge Kuhl sustained in its entirety Defendants’ demurrer to the public nuisance,
 17 negligence, and gross negligence claims of four “representative” School District plaintiffs under Florida,
 18 California, Washington, and Rhode Island law. *See* ECF 934-1 (Opinion and Order). On June 11, 2024,
 19 Defendants filed a motion to implement the Court’s demurrer ruling, and on June 14, 2024, Plaintiffs filed
 20 a motion to stay the school district cases pending appeal of the demurrer ruling. The Parties filed responses
 21 to each of the respective motions on June 20, 2024.

22 On June 26, 2024 Judge Kuhl issued a Tentative Ruling denying Defendants’ Motion and granting
 23 Plaintiffs’ Motion, stating “[a]ll parties should be advantaged by obtaining certainty by way of appeal”
 24 and “[a] stay of this litigation for all purposes as to School District Plaintiffs who are not the subject of
 25 the forthcoming appeal will also ensure that, prior to dismissal of any such cases, Defendants can make

1 whatever arguments they may have that dismissal without prejudice should not be permitted.” See Exhibit
 2 A, JCCP 5255, June 27, 2024 Tentative Ruling.

3 On June 27, 2024 Judge Kuhl held a status conference with the Parties, heard argument on her
 4 Tentative Ruling from both Defendants and Plaintiffs, and affirmed her Tentative Ruling. She ordered
 5 Defendants to render a submission of final judgment within 10 days, and allowed Plaintiffs 5 days
 6 thereafter to submit any objection to the form of judgment.

7 During the Status Conference, Judge Kuhl also heard argument on bellwether selection.
 8 Approximately one week before the status conference, a pool of 24 personal injury bellwether plaintiffs
 9 was randomly selected. Five of those plaintiffs subsequently voluntarily dismissed their cases and, in
 10 advance of the June 27 status conference, the Parties submitted briefing regarding their views on “outlier”
 11 bellwethers (of those remaining in the pool). Judge Kuhl ordered that three bellwether plaintiffs be
 12 stricken from the pool, and ordered that eight new bellwethers be randomly selected to replace the
 13 dismissed and stricken plaintiffs, drawing from the same underlying plaintiff categories and genders.
 14 Replacement bellwethers were randomly selected on July 1. Discovery is now open as to all bellwether
 15 personal injury plaintiffs in the JCCP.

16 Finally, Judge Kuhl ordered a supplemental briefing schedule on Plaintiffs’ amended non-product
 17 negligent failure to warn claims.

18 Judge Kuhl set the next JCCP CMC for July 19 at 9:00am.
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 20

21 Respectfully submitted,

22 DATED: July 2, 2024

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1 **ATTESTATION**

2 I, Lexi J. Hazam, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the
3 filing of this document has been obtained from each signatory hereto.

4
5 Dated: July 2, 2024

6 By: /s/Lexi J. Hazam

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